No. 85-920

(9)

Supreme Court, U.S.
FILED
JUL 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALASKA AIRLINES, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

DOUGLAS LETTER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

51pp

QUESTION PRESENTED

Whether the legislative veto provision in subsection (f)(3) of Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1552(f)(3), is severable from the remainder of Section 43, which imposes on air carriers a duty to hire airline employees who have been displaced from their jobs following deregulation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement:	
A. The Airline Deregulation Act	2
B. The employee protection program	4
C. The proceedings below	7
Summary of argument	12
Argument:	
I. The court of appeals correctly decided that the legislative veto provision of Section 43(f) should be severed from the duty-to-hire provisions of Section 43(d)	16
A. The court of appeals applied the proper rule of severability	16
B. The structure, language, and legislative history of the statute show plainly that Congress would not wish to abandon the remainder of Section 43	21
1. The structure and language of the statute	21
2. The legislative history of the statute	27
a. Initiation of the bill in the Senate	28
b. The Senate debate on the bill	32
c. The House Bill	34
d. The House debates	35
e. The bill reported by the conference	36
Conclusion	42

TABLE OF AUTHORITIES

Cases: Page

Aaron v. *SEC*, 446 U.S. 680 21
Alaska Airlines, Inc. v. *Brock*, 632 F. Supp. 178 11
Bowsher v. *Synar*, No. 85-1377 (July 7, 1986) 26
Buckley v. *Valeo*, 424 U.S. 1 ..... 12, 16, 18
Carter v. *Carter Coal Co.*, 298 U.S. 238 19
Champlin Refining Co. v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210 ..... 9, 12, 16, 17, 18
Consumer Energy Council v. *FERC*, 673 F.2d 425, aff'd *sub nom. Process Gas Consumers Group* v. *Consumer Energy Council*, 463 U.S. 1216 ..... 32, 42
Consumer Product Safety Comm'n. v. *GTE Sylvania, Inc.*, 447 U.S. 102 21
EEOC v. *Allstate Insurance Co.*, 467 U.S. 1232 15
El Paso & N.E. Ry. v. *Gutierrez*, 215 U.S. 87 ..... 17, 19
Greyhound Corp. v. *Mt. Hood Stages, Inc.*, 437 U.S. 322 21
Gulf Oil Corp. v. *Dyke*, 734 F.2d 797, cert. denied, No. 84-20 (Oct. 1, 1984) 10
Heckler v. *Edwards*, 465 U.S. 870 15
INS v. *Chadha*, 462 U.S. 919 ..... *passim*
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 ..... 12, 18
People ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N.Y. 48, 129 N.E. 202 43
Regan v. *Time, Inc.*, 468 U.S. 641 ..... 12, 17, 19, 23
Tilton v. *Richardson*, 403 U.S. 672 ..... 10, 13, 18
United States v. *Jackson*, 390 U.S. 570 ..... 12, 18, 19, 23

Statutes and regulation:

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* 3
49 U.S.C. App. 1371(c) 3
49 U.S.C. App. 1371(d) 3
49 U.S.C. App. 1371(d)(7) 4
49 U.S.C. App. 1373 4
49 U.S.C. App. 1482(d) 3
49 U.S.C. App. 1551 4
49 U.S.C. App. 1551(a)(1)(A) 3
49 U.S.C. App. 1551(a)(2) 4
49 U.S.C. App. 1551(a)(3) 3

Statutes and regulation—Continued: Page

49 U.S.C. App. 1552 (§ 43) ..... *passim*
49 U.S.C. App. 1552(a)-(c) (§ 43(a)-(c)) 5, 21
49 U.S.C. App. 1552(a)(1) (§ 43(a)(1)) 5
49 U.S.C. App. 1552(b)(1) (§ 43(b)(1)) 5, 21, 22
49 U.S.C. App. 1552(d) (§ 43(d)) 5, 13, 22
49 U.S.C. App. 1552(d)(1) (§ 43(d)(1)) 5, 6, 22, 23
49 U.S.C. App. 1552(d)(2) (§ 43(d)(2)) 6, 23
49 U.S.C. App. 1552(d)(3) (§ 43(d)(3)) 6, 23
49 U.S.C. App. 1552(e) (§ 43(e)) 5, 21
49 U.S.C. App. 1552(f) (§ 43(f)) 24
49 U.S.C. App. 1552(f)(1) (§ 43(f)(1)) 6
49 U.S.C. App. 1552(f)(2) (§ 43(f)(2)) 6, 14, 24, 25
49 U.S.C. App. 1552(f)(3) (§ 43(f)(3)) 6, 7, 25
49 U.S.C. App. 1552(g) (§ 43(g)) 21
49 U.S.C. App. 1552(h) (§ 43(h)) 5, 21
49 U.S.C. App. 1552(h)(1) (§ 43(h)(1)) 5, 22
28 U.S.C. 1252 ..... 9, 15
28 U.S.C. 1291 15
Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.* 2
Rail Passenger Service Act, 45 U.S.C. 565(b) 39
Redwood National Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163 *et seq.* 39
29 C.F.R. 220.21(a)(1) 11, 12

Miscellaneous:

124 Cong. Rec. (1978)
p. 10647 32
p. 10649 32
pp. 10674-10675 33
pp. 10674-10676 33
p. 10677 33
pp. 10677-10678 33
p. 10679 33
p. 10682 33
p. 10683 33
p. 10695 34
p. 10698 34
p. 19427 38

Miscellaneous—Continued: Page

p. 29526 35
pp. 29529-29530 35-36
p. 30671 36
p. 30708 36
p. 37416 36
p. 37421 36
p. 38521 36
p. 38522 ..... 37, 41, 42
p. 38523 ..... 27, 36, 41
p. 38524 37
pp. 38524-38525 ..... 27, 36, 41

130 Cong. Rec.:
p. H2520 (daily ed. Apr. 10, 1984) 38
p. H10516 (daily ed. Oct. 1, 1984) 38

Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658, H.R. 8231, and Related Bills, Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 38

44 Fed. Reg. 19146 (1979) 7

47 Fed. Reg. 41304 (1982) 7

48 Fed. Reg. (1983):
p. 52854 7
p. 52863 11

H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. (1978) 3

H.R. Rep. 95-1211, 95th Cong., 2d Sess. (1978) 4, 34, 35

House Comm. on Public Works, 96th Cong., 1st Sess., *Legislative History of the Airline Deregulation Act of 1978* (Comm. Print 96-5, 1979) ..... *passim*

Legislative Veto Proposals: Hearings on S. 890 and S. 864, Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 37-38

Levitas & Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 Hofstra L. Rev. 593 (1984) 38

S. Rep. 95-631, 95th Cong., 2d Sess. (1978) ..... *passim*

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-920

ALASKA AIRLINES, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 766 F.2d 1550, and the opinion of the district court (Pet. App. 30a-37a) is reported at 594 F. Supp. 92.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1985, and a petition for rehearing was denied on September 11, 1985. The petition for a

writ of certiorari was filed on November 27, 1985; the Court granted the petition on March 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. The Airline Deregulation Act

Beginning in 1938 and for the next forty years, the federal government, acting through the Civil Aeronautics Board ("CAB"), extensively regulated the commercial airline industry. Pursuant to the Civil Aeronautics Act of 1938 and its successor, the Federal Aviation Act of 1958 (49 U.S.C. 1301 *et seq.*), the CAB "provided for comprehensive regulation of prices and entry in domestic air transportation" (S. Rep. 95-631, 95th Cong., 2d Sess. 2 (1978) [hereinafter cited as S. Rep. 95-631]; *Leg. Hist.* 168).[1] Over time, however, Congress came to believe that price and entry regulation was producing undesirable results. "Broad regulation of fares and rates ha[d] discouraged price competition at every turn [and] [n]ew entrants ha[d] been singularly unsuccessful in gaining new route authority" (S. Rep. 95-631, at 2; *Leg. Hist.* 168). "In short," the Congress concluded, "a careful analysis of the regulatory system indicated that it was imposing costs upon the industry and raising prices to consumers without producing any offsetting benefits" (*Leg. Hist.* v-vi) (Introduction by Harold T. (Bizz) Johnson, Chair-

[1] Much of the legislative background of the Deregulation Act has been compiled in a single volume entitled House Comm. on Public Works, 96th Cong., 1st Sess., *Legislative History of the Airline Deregulation Act of 1978* (Comm. Print 96-5, 1979) [hereinafter cited as *Leg. Hist.*].

man, Committee on Public Works and Transportation).

In 1978, Congress decided that "[t]he time ha[d] come for a major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation so as to place primary emphasis on competition" (S. Rep. 95-631, at 52; *Leg. Hist.* 218). Enacting the Airline Deregulation Act of 1978 (the Deregulation Act), Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*, Congress took "historic" measures "to return the air transportation industry to [the] free enterprise economy" (S. Rep. 95-631, at 4; *Leg. Hist.* 170). It jettisoned the industry-wide fare structure previously enforced by the CAB and substantially altered the procedures by which airlines could enter new markets (49 U.S.C. App. 1371(c) and (d) and 1482(d)). It also abolished the licensing power of the CAB as of 1981, and, effective in 1984, eliminated the CAB altogether (49 U.S.C. App. 1551(a)(1)(A) and (a)(3)).

In making what it termed "a major change and fundamental redirection * * * [in the] regulation of * * * air transportation" (S. Rep. 95-631, at 52; *Leg. Hist.* 218), Congress felt "strongly that the movement to a more competitive airline system should be made without major disruptions to the industry or the traveling public" (S. Rep. 95-631, at 5; *Leg. Hist.* 171). For that reason, Congress made clear that the Deregulation Act was intended to effectuate a "gradual and phased transition to a deregulated system" (H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. 56 (1978); *Leg. Hist.* 898). During the first three years under the new act, for example, each previously certificated air carrier could enter only one new market without prior CAB approval (49 U.S.C.

App. 1371(d)(7)). And not until 1982 could carriers enter new markets and withdraw from unprofitable old ones, free from government regulation (49 U.S.C. App. 1551). Similarly, while Congress reduced the authority of the CAB over airline rates during the first three years of deregulation, it did not terminate that authority entirely until 1983 (49 U.S.C. App. 1373, 1551(a)(2)).

B. The Employee Protection Program

Just as it sought to minimize disruption to the industry and the traveling public, Congress in 1978 expressed its determination to "insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation * * * not [be] paid for by a minority—the airline employees and their families who have relied on the present system" (S. Rep. 95-631, at 114; *Leg. Hist.* 280). The Senate Committee recognized that airline employees had relied upon the system of regulation both in "their decision to enter the industry" and in their decision to remain (*ibid.*). Over time, the Senate reported, the regulatory structure had prevented the operation of "the normal free market" in employment; as a result, "[i]n order for Congress responsibly to change its policy now and require the industry to move toward a much more competitive market oriented environment, Congress should attempt to minimize the [employee] disclocations caused by the change" (*ibid.*). The House Committee expressed the same concern (see H.R. Rep. 95-1211, 95th Cong., 2d Sess. 22 (1978); *Leg. Hist.* 530).

Congress therefore provided a statutory Employee Protection Program ("EPP"), enacted as Section 43

of the Deregulation Act (49 U.S.C. App. 1352), to assist dislocated employees. The EPP as enacted had two parts. The first provided for monthly payments and relocation assistance to persons who had been employed by airlines for at least four years ("protected employees") and who lost their jobs or much of their income because of deregulation (Section 43(a)-(c), (e), and (h) of the Deregulation Act, 49 U.S.C. App. 1552(a)-(c), (e), and (h)). The Secretary of Labor was directed to promulgate "guidelines to be used by him in determining the amount of each monthly assistance payment to be made" (49 U.S.C. App. 1552(b)(1)). The financial assistance part of the EPP, however, was expressly made "subject to such amounts as are provided in appropriation Acts" (49 U.S.C. App. 1552(a)(1)); Congress never appropriated any funds, and the financial assistance program has not become operative and cannot become operative without future legislation. It is not involved in this case except as it bears on the intent of Congress in providing a legislative veto.

The second part of the EPP imposes on airlines certificated under the prior regulatory system a "duty to hire protected employees." Section 43(d), 49 U.S.C. App. 1552(d), provides that "[e]ach such air carrier hiring additional employees shall have a duty to hire [protected employees] before they hire any other person * * *" (§ 43(d)(1)). Protected employees are those who had been employed by a certificated carrier for at least four years as of the date that the Deregulation Act went into effect (49 U.S.C. App. 1552(d) and (h)(1). If any such employee is "furloughed or otherwise terminated" other than for cause within the ten years after October 24, 1978, a carrier covered by the section is obligated to hire him,

"in his occupational specialty," before it may hire any other job applicant to fill the position (except that the hiring carrier may first rehire any of its own previously furloughed employees) (49 U.S.C. App. 1552(d)(1)).

The duty to hire is imposed directly on the affected carriers by Section 43(d)(1). A separate provision directs the Secretary of Labor to "establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers" and to "make every effort to assist an eligible protected employee in finding other employment" (§ 43(d)(2)). Section 43(d)(2) further provides that "[i]n order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties under this subsection".[2]

A separate subsection of Section 43 provides that the Secretary of Labor "may issue, amend, and repeal such rules and regulations as may be necessary for the administration" of the EPP (49 U.S.C. App. 1552(f)(1)). It states that the "rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section [relating to monthly assistance payments] and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after October 24, 1978" (49 U.S.C. App. 1552(f)(2)). It also states that the Secretary may not issue any final rule until 30 legislative days after it has been submitted to the two transportation committees of Congress (49 U.S.C. App. 1552(f)(3)).

---

[2] The Secretary is also directed to encourage negotiations between air carriers and eligible protected employees "with respect to rehiring practices and seniority" (49 U.S.C. App. 1552(d)(3)).

Finally, it contains a legislative veto provision, declaring that any such final rule shall be submitted to Congress and shall become effective after 60 legislative days, unless during that 60-day period either House of Congress adopts a resolution disapproving the rule. *Ibid.*[3]

The Deregulation Act took effect on October 24, 1978. In March 1979, the Secretary published proposed regulations covering both the financial assistance and duty-to-hire portions of the EPP (44 Fed. Reg. 19146). Thereafter, in September 1982, the Secretary issued revised proposed regulations relating only to the duty to hire (47 Fed. Reg. 41304). Following receipt of public comments, the Secretary promulgated final regulations in November 1983 (48 Fed. Reg. 52854), and simultaneously submitted them to Congress. But for this litigation the regulations would have become effective on May 17, 1984.

C. The Proceedings Below

Petitioners are 14 airlines subject to the duty-to-hire provisions of the Deregulation Act. They brought this action in the United States District Court for the District of Columbia against the respondent Secretary; thereafter, several airline employee unions intervened as defendants. Among a variety of constitutional and statutory claims, petitioners contended that the legislative veto provision in Section 43 is unconstitutional under this Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983); that the veto provision is not severable from the balance

---

[3] If both Houses adopted an approval resolution during the 60-day period, the rule would become effective immediately (49 U.S.C. App. 1552(f)(3)).

of Section 43; and that the entire EPP must therefore be invalidated.

The Secretary agreed that under *Chadha* the legislative veto provision is unconstitutional. The Secretary argued, however, that the veto clause is severable from the remainder of Section 43, and that the Secretary's regulations relating to the duty-to-hire provisions of the EPP should therefore be sustained. The Secretary also defended his regulations against the other legal challenges raised by petitioners.

In May 1984, just before the Secretary's regulations were to have become effective, the district court granted summary judgment to petitioners (Pet. App. 30a-37a). The court struck down the entire EPP, holding that the legislative veto clause could not be severed from the remainder of Section 43 (Pet. App. 34a-37a). The court did not reach any of the other issues raised by the petitioners.

The district court first considered the test for severability of unconstitutional provisions. The court stated that "[t]he question is not * * * whether Congress would have enacted *some* type of employee protection plan in the absence of a legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute. If not, the Court cannot enforce the remainder of the statute merely because it might be an approximation of what Congress would have enacted" (Pet. App. 33a n.3 (emphasis in original)). Examining the text and history of the Deregulation Act, the court concluded that "Congress considered the legislative veto provision to be integral to the EPP and that Congress would not have enacted § 43 in its present form without such a provision" (*id.* at 34a). The court found "most significant" the fact that Section 43 was the only portion of the De-

regulation Act to contain a legislative veto (Pet. App. 34a). The court also found in the legislative history of Section 43 evidence that Congress wanted to "subject to a legislative veto" what the district judge felt was a "grant of * * * broad authority to the Secretary" (Pet. App. 35a). The court discounted the fact that there was "relatively little discussion of the veto provision in the legislative history of the Act" (*ibid.*). Applying its view of the governing legal standard, the district court was unable to find that Congress "would * * * have enacted the remainder of § 43 in its present form without [the legislative veto]" (*id.* at 36a). It therefore invalidated the entire EPP (*id.* at 37a).

The Court of Appeals for the District of Columbia Circuit reversed, holding that the legislative veto provision was severable from the rest of Section 43.[4] The court of appeals first reviewed the severability principles articulated by this Court in *Chadha* and other cases. Following *Chadha* and earlier cases dating back to *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210 (1932), the court held that the legislative veto provision must be severed "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not'" (Pet. App. 16a (quoting *Chadha*, 462 U.S. at 931-

[4] Before reaching the merits of petitioners' claims, the court first held that appellate jurisdiction properly lay in the court of appeals, notwithstanding the provisions of 28 U.S.C. 1252 (Pet. App. 6a-9a). The court then determined that the severability issue was ripe, despite the fact that Congress had never exercised the legislative veto contained in Section 43 (Pet. App. 9a-10a). The court also concluded that the district court had correctly decided that this Court's decision in *Chadha* applies retroactively to earlier enacted veto provisions (*id.* at 11a-15a).

932)). The court of appeals rejected petitioners' construction of that language, according to which the entire statute must be invalidated whenever "Congress would have passed some alternative version of the statute if it knew that it could not lawfully have included the offending provision" (*id.* at 18a). That approach, the court of appeals determined, would violate " '[t]he cardinal principle of statutory construction [which] is to save and not to destroy' " (*id.* at 18a n.9 (quoting *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971)). Limiting its consideration to the two available choices, the court of appeals held that " 'the question is * * * whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute[] at all' " (Pet. App. 18a, quoting *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797, 804 (Temp. Emer. Ct. App.), cert. denied, No. 84-20 (Oct. 1, 1984)).[5] In making that determination in this case, the court of appeals further noted, petitioners must overcome a presumption of severability because the duty-to-hire provision "is fully operative as a law" without the legislative veto provision (Pet. App. 16a-17a (quoting *Chadha*, 462 U.S. at 934)).

The D.C. Circuit reviewed the text and legislative history of the Deregulation Act in light of these standards (Pet. App. 20a-24a, 27a-28a). In the legislative history the court found that Congress had expressed "a strong, humanitarian desire to provide for airline employee protection" and, by contrast, had evinced "relatively little concern about the veto pro-

[5] The court of appeals did not state, as petitioners imply (Br. 7), that the test is whether Congress would have preferred *any* protection statute to none at all. It simply compared the statute it had with the only available alternative—striking it down.

vision" (*id.* at 19a). The court rejected petitioners' argument that the structure of the oversight provisions "evidenc[ed] a Congressional intent of inseverability" (*id.* at 24a-27a). After examining the record in considerable detail the court concluded that "[a]mple evidence persuades us that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan." *Id.* at 28a.[6] The court of appeals therefore upheld the balance of Section 43 and remanded the case to the district court to consider petitioners' remaining challenges (Pet. App. 28a).[7]

---

[6] Judge Ginsburg concurred in the judgment. Like the majority, she concluded that "[d]eletion of the veto preserves Section 43 and thereby gives effect to the dominant intent of Congress," while a declaration of inseverability "would be far more destructive of the legislature's will" (Pet. App. 29a).

[7] On remand, the district court sustained all but one of the Secretary's regulations against petitioners' contention that they were inconsistent with the Deregulation Act (*Alaska Airlines, Inc.* v. *Brock*, 632 F. Supp. 178 (D.D.C. 1986)). The sole exception was Section 220.21(a)(1) (29 C.F.R.) of the regulations (Pet. App. 52a; 48 Fed. Reg. 52863 (1983)), which deals with the initial hiring age of designated employees. The district court remanded to the Secretary that part of the rule that affected flight officers and pilots. After the district court and court of appeals declined to stay the effective date of the remainder of the regulations, the Chief Justice, by order dated January 27, 1986, denied petitioners' application for a stay pending the Court's disposition of petitioners' certiorari petition. No. A-571. The Secretary's regulations accordingly went into effect on January 27, 1986. After this Court granted certiorari approximately one month later, the D.C. Circuit recalled its mandate, as it automatically does in such instances. On May 9, 1986, pursuant to the Secretary's motion, the court of appeals reissued its mandate, thereby allowing the Secre-

SUMMARY OF ARGUMENT

I. The court of appeals faithfully applied the rule prescribed by this Court for determining whether an unconstitutional provision is severable: the unconstitutional provision should be severed and the balance of the statute sustained " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not' " (*Chadha*, 462 U.S. at 931-932, quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), and *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). Applied to this case, as the court of appeals held (Pet. App. 18a-19a), this rule dictates sustaining the duty-to-hire provisions "unless it is evident" that the enacting Congress would have preferred to abandon the duty-to-hire provisions if it had known that it could not have the legislative veto provision.

The phrase "unless it is evident" reflects a strong presumption in favor of severability. The Court has held that a further presumption arises when what remains is " 'fully operative as a law' " (*Chadha*, 462 U.S. at 934, quoting *Champlin*, 286 U.S. at 234; see also *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); *United States* v. *Jackson*, 390 U.S. 570, 585-591 (1968)). Courts have no authority to invalidate federal statutes except the command of the Constitution, see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176-180 (1803), or the expressed or "evident" intent of Congress that an otherwise valid

---

tary's program to go back into effect. On May 20, 1986, the Chief Justice denied petitioners' request that the mandate be recalled and stayed. The regulations are now in operation, with the exception of Section 220.21(a)(1), insofar as it relates to flight officers and pilots.

provision is to fall with an unconstitutional provision. Absent such instructions, the duty of the court is " 'to save and not to destroy' " (*Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971)), permitting Congress, and not the courts, to reconsider otherwise valid provisions after a portion of the statute has been found unconstitutional.

Petitioners' contention that the court of appeals "formulated * * * a completely new standard" that "violates the * * * separation of powers" (Br. 9-10), is groundless. The court of appeals, expressly following this Court's instructions, made a meticulous examination of the only issue a court *does* have the power to decide: whether it is evident (from the text, structure, or legislative history) that Congress would not have wanted the courts to enforce the constitutional remainder of a statute, after the unconstitutional part was stricken. It is petitioners, who insist that courts speculate about whether Congress would have preferred some third possibility—perhaps a statute "with different form, content or language" (Br. 15)—who would have the courts intrude on the legislative domain and strike down otherwise valid legislation without instructions from Congress to do so.

II. As the court of appeals concluded, the structure and language of the EPP show plainly that Congress would have wanted the duty-to-hire provisions in Section 43(d) to survive. The statute itself imposes the duty to hire directly on the air carriers; the Secretary is given only the routine functions of gathering and providing information and otherwise assisting. The statutory requirements imposed on the air carriers do not depend on any regulatory action by the Secretary and would not have been subject to any veto. There is not the slightest reason to suppose, as petitioners do, that Congress would prefer

to abandon the detailed structure that *it* created simply because it lost the power to veto regulations of the Secretary that, in respect of this part of the EPP, were entirely routine.

The legislative history also confirms the court of appeals' conclusion "that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan" (Pet. App. 28a). The EPP was described, again and again in the legislative debates, as an important "insurance" feature of deregulation; the veto provision, on the other hand, appears to have been a reflexive addition to the bill, added almost without comment.

In particular, there is not the slightest suggestion that any member of Congress anticipated the possibility of vetoing any regulation relating to the duty-to-hire provisions. The only mention of the legislative veto in the committee reports relates it to the financial assistance program (which is now inoperative), not the duty-to-hire provisions that are before the Court. (The statute itself, in fact, suggests in Subsection (f)(2) that the desire for congressional oversight related principally to the financial assistance program.) Moreover, the only comment on the veto clause in the debates in either House came from one House member, long a champion of the legislative veto, who noted his routine approval of the inclusion of such a clause in the Conference Bill—without suggesting any particular concern about duty-to-hire regulations or any others; in fact, the House Bill, which he had actively supported, did not contain a veto clause. A fair reading of the legislative record thus richly confirms what the court of appeals concluded: there is no reason to believe that, if Congress had

anticipated the demise of the legislative veto, it would have wanted the courts to invalidate the duty-to-hire provisions of the EPP.[8]

---

[8] Petitioners contend, as they did below, that the court of appeals lacked jurisdiction because the district court's decision held "an Act of Congress unconstitutional" and therefore, pursuant to 28 U.S.C. 1252, could only be appealed directly to this Court. As the court of appeals concluded in rejecting this argument (Pet. App. 6a-9a), this Court's jurisdictional ruling in *EEOC* v. *Allstate Insurance Co.*, 467 U.S. 1232 (1984), resolves this question against petitioners. There, the EEOC took a protective appeal to this Court pursuant to 28 U.S.C. 1252 from a district court decision holding the legislative veto provision in the Reorganization Act of 1977 inseverable from the remainder of the enactment. At the same time, however, the EEOC contended that the severability holding of the district court presented simply a question of legislative intent—not one of the constitutionality of the remaining provisions. As such, the EEOC maintained, an appeal was properly brought to a court of appeals pursuant to 28 U.S.C. 1291. See *Heckler* v. *Edwards*, 465 U.S. 870 (1984). This Court dismissed the appeal in *Allstate*, making it clear that an appeal under these circumstances must be taken to the court of appeals.

Petitioners' effort to distinguish *Allstate* (Br. 13 n.13) is unavailing. They contend that in *Allstate* the appellants challenged only the *remedy* ordered by the district judge, after he had found the veto provision unconstitutional. By contrast, petitioners maintain, here the United States has challenged the district court's finding of inseverability. But this is just a semantic quibble: the "remedy" challenged in *Allstate* was the same as that which the Secretary appealed from here—the declaration that a legislative veto provision is, by virtue of legislative intent, inseverable from the balance of the statute. Under this Court's unanimous holding in *Heckler* v. *Edwards*, 465 U.S. at 885, an appeal only from that judgment—which does not challenge the underlying decision that the veto is unconstitutional—does not vest jurisdiction in this Court under 28 U.S.C. 1252.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE LEGISLATIVE VETO PROVISION OF SECTION 43(f) SHOULD BE SEVERED FROM THE DUTY-TO-HIRE PROVISIONS OF SECTION 43(d)

A. The Court of Appeals Applied The Proper Rule Of Severability

Both courts below, and all parties in this Court, have agreed that this case is governed by the severability rule repeatedly stated by this Court (*Chadha*, 462 U.S. at 931-932, quoting *Buckley*, 424 U.S. at 108, and *Champlin*, 286 U.S. at 234):

> [T]he valid portions of a statute are to be severed " 'unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' "

Petitioners have misinterpreted this *Champlin* rule in two respects.

First, petitioners make the remarkable assertion that under the *Champlin* rule an entire statute must be invalidated whenever it appears that Congress—had it known that one portion would be declared invalid—would have modified the remainder in any respect (Br. 15, 18).[9] To make that formulation seem more plausible, petitioners repeatedly (and incorrectly) attribute to the Secretary, and to the court of appeals, a formulation that would sustain the re-

---

[9] Even if petitioners' formulation were correct, it would not change the result in this case: as we show below, there is no evidence that Congress would have modified the duty-to-hire provisions in any respect if it had known that it could not have a legislative veto.

mainder of a statute whenever it appears that Congress would have enacted *any* statute with the same general purpose (*i.e.*, Br. 9-10).

Both of petitioners' formulations—the one that they endorse and the one that they erroneously ascribe to the court of appeals—are wrong. A court's proper task, when deciding severability, is to choose between the two *available* alternatives, saving the balance of what Congress in fact enacted, unless it is evident that Congress would not have wanted the remainder enforced in the absence of the unconstitutional provision. That is the plain meaning of the *Champlin* rule, and that is the only formulation that avoids intrusion upon Congress' prerogatives. Both of petitioners' formulations would lead to inappropriate, and inevitably fruitless, speculation about legislation neither adopted nor actually considered by Congress. And both would rest the fate of provisions Congress actually enacted on the hypothetical fate of imaginary alternative legislation.

Second, petitioners ignore the strong presumption, reflected in the *Champlin* rule, in favor of severance. The words "unless it is evident * * *" obviously imply such a presumpton. Explaining the reason for the presumption, the plurality in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), said, "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary" (*id.* at 652; accord *id.* at 661, 677 (Brennan, J., dissenting and concurring); cf. *El Paso & N.E. Ry.* v. *Gutierrez*, 215 U.S. 87, 96 (1909)). The Court has also repeatedly stated that where the valid remainder of a statute " 'is fully operative as a law,' " the invalid provision "is fur-

ther presumed severable" (*Chadha*, 462 U.S. at 934, quoting *Champlin*, 286 U.S. at 234).[10] These presumptions reflect the fact that courts have no authority to invalidate federal statutes except the command of the Constitution, see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176-180 (1803), or the expressed or "evident" intent of Congress. The duty of the courts is to sustain constitutionally valid parts of a statute unless either there is a clear indication in the statute or its legislative history that Congress would have wanted them to fall, in the absence of the unconstitutional part, or the valid parts cannot operate without the unconstitutional part.

The decision of the court of appeals in this case was entirely faithful to the severability rule articulated by this Court. Following *Chadha*, the court of appeals held that the veto provisions should be severed " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not' " (Pet. App. 16a, quoting *Buckley*, 424 U.S. at 108). Noting, further, the presumption in favor of severability where, as here, the valid portion " 'is fully operative as a law' " (Pet. App. 16a, quoting *Chadha*, 462 U.S. at 934), the court of appeals held, consistent with this Court's decisions, that "[o]nly if we conclude that Congress would not have included [the balance of Section 43] absent the constitutionally flawed portion [are those] provision[s] to fall" (Pet. App. 18a). The court reviewed the language

[10] In *Chadha*, the Court also found a presumption based on the existence of a severability clause. It is clear that, while the presence of a severability clause certainly strengthens the case for severance, the absence of such a clause does not raise a presumption against severability. See *Tilton* v. *Richardson*, 403 U.S. at 684; *United States* v. *Jackson*, 390 U.S. at 585 n.27.

and structure of Section 43, together with its legislative history, and concluded that had Congress known that the veto would be found unconstitutional, it would *not* have preferred "no employee protection program over the program passed by Congress shorn of its veto provision" (Pet. App. 28a).

The court of appeals asked precisely the right question. The district court had only two choices when it found the legislative veto portion of the EPP invalid: save the duty-to-hire provisions or strike the duty-to-hire provisions. Since that choice depended on legislative intent (*Regan*, 468 U.S. at 653; *Jackson*, 390 U.S. at 585-591; *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313 (1936)), the relevant question, in this case, is just as the court of appeals put it: would Congress have preferred "no employee protection program over the program passed by Congress shorn of its veto provision" (Pet. App. 28a).

Petitioners contend that the court of appeals' approach "rais[es] serious separation-of-powers concerns" (Br. 19) and "improperly allows the judiciary to reformulate statutes to create laws which are not at all what Congress contemplated" (Br. 17). But this is simply not a case in which a court has changed the meaning of a statute in order to save its constitutionality. The court of appeals here sought "to save as much of the statute as [it] can" (Pet. App. 18a; see *Regan*, 468 U.S. at 652; *El Paso & N.E. Ry.*, 215 U.S. at 96), by sustaining otherwise valid provisions that operate independently and that Congress clearly considered important. It did so without in any way "reformulating" the duty-to-hire provisions or departing in any way from what Congress contemplated. And it left to Congress the task of revising the EPP, should it choose to, in light of the demise of the legislative veto.

Under petitioners' theory, on the other hand, if a court finds anything in the otherwise valid balance of a statute that it guesses Congress might have written differently were it not for the invalid provision, the court must strike the whole enactment—even if it is clear that Congress would have preferred to keep the balance of the statute rather than lose it. It could not be plainer that the court of appeals honored (as far as possible) what Congress wrote and intended, while petitioners' approach would force the courts into speculation about legislation Congress did not enact.

Finally, this case illustrates perfectly still another problem with petitioners' approach to severability: there is no stopping place. Petitioners apparently believe—and the district court, accepting petitioners' legal premise, expressly held (Pet. App. 37a n.5)—that the EPP was severable from the balance of the Deregulation Act. Thus, the district court concluded, the invalidation of the EPP did not require the entire deregulation statute to be struck down. The court so held because, in its view, "[n]othing in the statute or legislative history even remotely suggests that Congress would not have passed the Act without the EPP or that in the absence of an EPP it would have taken a different approach to deregulation" (*ibid.*). In fact, there is a good deal of evidence that at least some members of Congress would have taken a much dimmer view of the rest of the Deregulation Act had the draftsmen not included the EPP. See, *e.g.*, S. Rep. 95-631, at 221; *Leg. Hist.* 387 (Sen. Inouye); *id.* at 216; *Leg. Hist.* 382 (Sen. Danforth). Indeed, the evidence unmistakably shows that the EPP was more essential to the passage of the entire Deregulation Act than the legislative veto was to the passage of the EPP. See pages 28-39, *infra*. Under petitioners'

proposed standard it is hard to see why the balance of the Deregulation Act should not be invalidated along with the EPP. Certainly, petitioners do not say.

B. The Structure, Language, And Legislative History Of The Statute Show Plainly That Congress Would Not Wish To Abandon The Remainder Of Section 43

1. *The Structure And Language Of The Statute*

"[T]he starting point for interpreting a statute," this Court has noted, "is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive" (*Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Accord *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). Here, the language and structure of Section 43 leave no doubt that Congress would have wanted the duty to hire it imposed on petitioners to be sustained, notwithstanding the invalidity of the legislative veto.

Section 43 established two different kinds of protection for employees displaced from their jobs as a result of airline deregulation. The first program, embodied in Section 43(a)-(c), (e), (g), and (h), 49 U.S.C. App. 1552(a)-(c), (e), (g), and (h), was intended to provide "monthly assistance" and other financial support to eligible employees. Under this program, eligible employees were entitled to receive, "subject to such amounts as are provided in appropriation Acts," a "monthly assistance payment * * * in an amount computed by the Secretary" (§ 43(b)(1), 49 U.S.C. App. 1552(b)(1)). In discharging his considerable discretion under this provision, the Secretary of Labor, "after consultation with the Secretary of Transportation," was to "promulgate guide-

lines to be used by him in determining the amount of each monthly assistance payment to be made" (§ 43(b)(1), 49 U.S.C. App. 1552(b)(1)). This program, however, was never funded by Congress and, thus, never went into effect.

The other program provided by Section 43, embodied in Section 43(d), 49 U.S.C. App. 1552(d), imposed on air carriers a "duty to hire protected employees" who were "furloughed or otherwise terminated" by an air carrier during the 10-year period beginning with the effective date of the Deregulation Act. In contrast to the assistance provisions, Congress imposed this obligation, unconditionally, in the statute itself and spelled out the "duty to hire" in some detail. Paragraph 43(d)(1) gives "[e]ach person who is a protected employee of an air carrier"—defined by Congress in Section 43(h)(1), 49 U.S.C. App. 1552(h)(1)—"who is furloughed or otherwise terminated by * * * an air carrier (other than for cause)" a "first right of hire" for a specific period of time. This right of hire, Congress stated, extends only to the employee's "occupational specialty" but may be enjoyed "regardless of age." Each affected air carrier—defined by Congress in Subsection (d)(1)—"shall have a duty to hire" protected employees "before they [sic] hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person." Further, each employee rehired pursuant to this subsection "shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him."

Whereas the now inoperative assistance program could not have functioned without a substantial exercise of discretion by the Secretary (who was to fix the guidelines for benefits), the statute does not make

the airlines' duty to hire dependent on regulation at all.[11] The Secretary's role is an auxiliary one, and the scope of his assigned duties is routine; there is no reason whatever to think Congress might have wanted to veto his exercise of those functions. The Secretary is mentioned only in an entirely separate provision (§ 43(d)(2)), which directs him to "publish a comprehensive list of jobs available with air carriers", which list "shall include * * * information and detail * * * such as job descriptions and required skills." The same provision directs him to "make every effort to assist an eligible protected employee in finding other employment." To carry out these functions "the Secretary may require each * * * air carrier to file with the Secretary * * * reports, data, and other information." [12]

Congress did not make the airlines' duty to hire, which is set forth in Section 43(d)(1), conditional in any way on regulations and did not subject it to any legislative veto. That fact provides the clearest possible evidence that Congress would not have wanted the duty to hire invalidated merely because the legislative veto was invalidated. And the responsibilities that Congress *did* give the Secretary with respect to the duty to hire (in contrast to his responsibilities

---

[11] The Court need not decide in this case whether, if the assistance provisions had not been rendered inoperative by Congress' failure to fund them, they would have been invalidated as inseverable from the legislative veto. The fate of the duty-to-hire provisions does not depend in any way on that question. See *Regan*, 468 U.S. at 653; *Jackson*, 390 U.S. at 585-591.

[12] A separate provision provides that, in addition to these duties, "the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority" (§ 43(d)(3)).

under the assistance program) were auxiliary activities in connection with a program whose basic obligations were defined and imposed on the carriers by Congress itself. There is no reason to believe that Congress contemplated the possibility of vetoing any of the Secretary's actions in connection with the duty-to-hire program.[13]

The language of Section 43(f), which contains the legislative veto, also confirms that to the extent that Congress wanted to oversee anything, it was the anticipated assistance regulations, not the Secretary's activities in connection with the duty to hire. Section 43(f)(2) provides that within six months the Secretary shall promulgate "[t]he rule containing the guidelines which is required to be promulgated pursuant to subsection (b) [establishing the "monthly assistance" program] and any other rules or regulations which the Secretary deems necessary to carry out this section." Congress' principal concern—the only set of regulations that it identified specifically in Subsection (f)—was the regulations under the

---

[13] Petitioners' assertion that "Section 43 required *the Department of Labor* * * * to establish a novel, untested type of labor protection" (Br. 3) (emphasis added) is incorrect. It was Congress, not the Secretary, which imposed the duty to hire from which petitioners now seek to escape, and it is to Congress that they should address their objections. Petitioners' suggestion that because of purported "uncertainty about the need for labor protection * * * Congress did not fully develop the EPP" (Br. 4) is similarly mistaken. The EPP was, as petitioners acknowledge (Br. 3), an "insurance" program, and it was of course hoped that few employees would need to call on it; but Congress exhibited no uncertainty whatever about whether the duty-to-hire part of the insurance should go into effect. To the contrary, Congress unambiguously declared its intent to impose on air carriers a duty to hire displaced workers.

"monthly assistance" program. And it is not hard to see why: with respect to the financial assistance program, Congress delegated the hard, and expensive, choices to the Secretary, subject to appropriation by Congress.[14]

The case for severability of the legislative veto is strengthened by the fact that Subsection 43(f)(3) also provides for a so-called "report and wait" rule, under which the Secretary may not "issue any rule or regulation as a final rule or regulation * * * until 30 legislative days after it has been submitted" to the congressional transportation committees. As a result of this provision, the demise of the veto did not deprive Congress of all power to review the Secretary's regulations. Congress retains the authority to review proposed regulations and, if it wishes, to disapprove them through constitutionally permissible legislation.[15]

---

[14] Petitioners find fault with the court of appeals' determination that the legislative veto was primarily directed at the payment regulations—not the duty to hire (Br. 40 n.49). They argue that Congress intended both parts of the EPP to "operate in tandem" (*ibid.*). Whatever that may mean (and, of course, it has not proven to be the case in practice), it does not contradict the considerable evidence that the *only* source of controversy in the EPP was the assistance provisions. Those provisions were, potentially, the costliest and, under the statutory framework, involved the greatest measure of delegated authority to the Secretary. Not surprisingly, the only part of the EPP to which the oversight provisions make specific reference is the portion giving the Secretary authority to promulgate guidelines for monthly payments (49 U.S.C. App. 1552(f)(2)).

[15] The Court made a similar point in *Chadha*, finding the legislative veto severable in part because a "report and wait" type of oversight remained available to Congress. The Court noted that, without the legislative veto, "Congress' oversight

Petitioners contend that Congress viewed the EPP as an "unprecedented" proposal, which was "fundamentally inconsistent with the overall deregulatory purpose manifest throughout the Act" (Br. 29, 33-34). They imply (*id.* at 32-33) that Congress inserted a veto provision "directly into subsection 43(f), the same provision granting the DOL delegation" (*id.* at 30), and combined the veto power with a "report and wait" requirement (*id.* at 32 & n.39), because Congress wanted a second look before the duty to hire was implemented. But, first, petitioners mischaracterize the record. Congress assuredly did not regard the duty to hire as a "novel, untested type of labor protection" (Br. 3); in fact, the Senate Report described the EPP as a program similar to ones that had been approved "in certain cases in the past" (S. Rep. 95-631, at 113; *Leg. Hist.* 279).[16] Moreover,

---

of the exercise of * * * delegated authority is preserved since all such suspensions will continue to be reported to it" (462 U.S. at 935). "Without the one-House veto," the Court observed, the remaining statute "resembles the 'report and wait' provision approved by the Court" in prior case law (*id.* at 935 n.9). See also *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 19 (inclusion of fallback provision indicative of legislative intent with respect to consequences of invalidation of statutory provision).

[16] Only Senator Zorinsky described the EPP as "without precedent", but he limited his characterization to the monthly payment program (S. Rep. 95-631, at 208; *Leg. Hist.* 374) (additional views of Sen. Zorinsky). That program, we have noted, was never funded and never became operational. The Senator did, however, find ample precedent for the duty-to-hire program, which he thought "mesh[ed] perfectly with this expanding competitive environment" (S. Rep. 95-631, at 206; *Leg. Hist.* 372). The Senator, in fact, proposed amending the EPP in a way which would have retained the duty-to-hire provisions in their present form. *Id.* at 208-209; *Leg. Hist.* 374-375.

Congress did not regard the EPP as "fundamentally inconsistent" with the deregulation bill. As petitioners are constrained to admit (Br. 43 n.53), some members of the House even favored a protection program stronger than the final bill. See 124 Cong. Rec. 38523 (1978); *Leg. Hist.* 983 (statement of Rep. Harsha); 124 Cong. Rec. 38524-38525 (1978); *Leg. Hist.* 986 (statement of Rep. Mineta). All of the evidence affirms Congress' belief that the EPP was entirely consistent with the desire that "movement to a more competitive airline system * * * be made without major disruptions" (S. Rep. 95-631, at 5; *Leg. Hist.* 171), and without causing the benefits of the deregulation to be "paid for by a minority—the airline employees and their families" (*id.* at 114; *Leg. Hist.* 280). While Congress clearly retained the right to decline to fund the assistance program, there is not the slightest evidence to support petitioners' suggestion that Congress wanted the duty to hire to be less than an unconditional statutory obligation.[17]

2. *The Legislative History Of The Statute*

The court of appeals "emerge[d] from [its] trek through the legislative history of the Airline Deregu-

---

[17] Petitioners point to the fact that out of the entire Deregulation Act only Section 43 contained a legislative veto (Br. 28-29) as demonstrating that Congress would not have wanted the duty-to-hire provisions to be sustained in the absence of the legislative veto. But the uncommented-on absence of a veto clause in other provisions of the Act says nothing whatever about (i) whether Congress considered the veto clause in Section 43 more important, or less important, than other veto clauses it has adopted or (ii) whether Congress would not have enacted the duty-to-hire provisions of Section 43 without it.

lation Act" persuaded "that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act" (Pet. App. 28a). "[W]hat evidence there is," the court declared, "indicates that Congress had a strong, humanitarian desire to provide for airline employee protection" during the deregulation process (*id.* at 19a, 22a). "In contrast," the court noted, "there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan" (*id.* at 28a). In short, the court concluded, given the only two choices that a court has when it strikes a portion of a statute (*id.* at 19a)

> the evidence * * * positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan.

As we show below, the court of appeals read the legislative history correctly. There is strong support for employee protection, but, in the entire history of Section 43, the legislative veto is mentioned only twice—once in a sentence in the Senate Report, which ties it to the assistance provisions and not the duty-to-hire provisions, and once in a routine comment by one Representative.

a. *Initiation Of The Bill In The Senate*

The airline regulatory system established in 1938 "subjected airlines to extensive economic regulation by the Civil Aeronautics Board" (*Leg. Hist.* v) (Introduction by Harold T. (Bizz) Johnson, Chairman, Committee on Public Works and Transportation).

> If an airline wished to change the cities it served or the prices it charged, it was required to seek

> permission from the Civil Aeronautics Board. The Board could refuse to allow the airline to take actions which would benefit consumers and which the airline believed to be in its best interest. Even if the Board ultimately granted an airline's request, there could be years of delay before the airline could implement its proposal [(*Leg. Hist.* v) (same)].

After forty years of an airline regulatory structure that had "outlived its usefulness" (*Leg. Hist.* v) (same), Congress enacted the Airline Deregulation Act of 1978, a "landmark" and "historic" reform which "free[d] the airline industry from excessive economic regulation" (*Leg. Hist.* v-vi) (same).[18] Because of the dramatic changes contemplated by this legislation, however, Congress determined that the "movement to a more competitive airline system should be made without major disruptions to the industry or the traveling public" (S. Rep. 95-631, at 5; *Leg. Hist.* 171). Accordingly, among other provisions, the Senate Bill contained an employee protection plan substantially identical to the version that was eventually enacted as Section 43 (S. Rep. 95-631, at 46-48; *Leg. Hist.* 212-214).

In the report that accompanied the bill when it reached the Senate floor, the legislators made clear that employee protection was a central concern. Some airlines, the Senate Report noted, may well "encounter such difficulties in adjusting that they will lose enough traffic to cause a major reduction in their total labor force" (S. Rep. 95-631, at 113; *Leg.*

---

[18] The Senate Report described the new legislation as "a major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation" (S. Rep. 95-631, at 52; *Leg. Hist.* 218).

Hist. 279). This prospect, the Senate observed, while uncertain, "should not be ignored" (*ibid.*). Over the years, the Report continued, "[r]egulation has * * * had the effect of reducing the potential for major employment reductions in individual airlines" (*ibid.*); as a result, once the burdens of regulation are lifted "a major reduction might occur in the labor force of one or more airlines" (*ibid.*). The Senate felt strongly that "[a]irline employees have relied on the present regulatory system" both in "their decision to enter the industry" and in their decision to continue in the field "within the context of the regulatory system" (*id.* at 114; *Leg. Hist.* 280). The Senate put its concerns squarely (*ibid.*):

> Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees. The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.

The Senate therefore proposed "a statutory employee protection program, as has been done in certain cases in the past" (S. Rep. 95-631, at 113; *Leg. Hist.* 279). Its report sheds considerable light on the intent of the legislators. First, if, as petitioners urge at length, the Senate evinced any "uncertainty" about the EPP (Br. 10), that uncertainty concerned solely

the financial assistance program, *not* the airlines' duty to hire dislocated employees. Thus, while the report reflected some passing concern about "the potential expenditure of Government funds" (S. Rep. 95-631, at 115; *Leg. Hist.* 281), it expressed no comparable concern over the duty-to-hire provisions. Indeed, the *only* reference in the Senate Report to congressional oversight of the Secretary's regulations stated that the "amount of [each monthly] payment would be * * * determined by regulations promulgated by the Department of Labor. These regulations will be subject to congressional review" (*id.* at 116; *Leg. Hist.* 282). The report gave no indication of any desire to oversee the Secretary's regulations relating to the duty to hire.

The Senate Report, then, corroborates the court of appeals' conclusion: Congress expressed substantial concern for employee welfare; and it paid little attention to legislative oversight. Moreover, what little interest the Senate expressed in exercising a reviewing power related solely to the assistance program, which has never become effective. The Senate said nothing indicating an interest in overseeing, let alone vetoing, regulations relating to the duty to hire.[19]

---

[19] The strong support for the duty to hire, and the lack of concern to oversee related regulations, are both illustrated by the views of the Senators who refused to vote for the Senate Bill in committee. Senator Zorinsky objected to the bill because its employee protection program was not *limited* to a duty to hire. His alternative proposal would have retained virtually the identical duty-to-hire plan (S. Rep. 95-631, at 208-209; *Leg. Hist.* 374-375) (additional views of Sen. Zorinsky), for which, the Senator acknowledged, there was "precedent" (*id.* at 206; *Leg. Hist.* 372) (same). Senator Zorinsky would simply have excised the funding program,

b. *The Senate Debate On The Bill*

Senator Cannon sponsored the Deregulation Act on the Senate floor on April 19, 1978 (124 Cong. Rec. 10647 (1978); *Leg. Hist.* 396). While he discussed the employee protection program (*id.* at 10649; *Leg. Hist.* 399), he said nothing about a legislative veto power—or, for that matter, congressional oversight generally. Indeed, when Senator Cannon caused a summary of the EPP to be printed in the Record, the summary did not even indicate that the legislation contained a legislative veto (*ibid.*). See *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd *sub nom. Process Gas Consumers Group* v. *Consumer Energy Council*, 463 U.S. 1216 (1983).

Thereafter, during the debates on the bill, various Senators reaffirmed their support for the EPP, and no Senator ever said anything at all about the legislative veto. For example, Senator Zorinsky, consistent with the views he had expressed when the bill emerged

---

which he believed might cost as much as $1 billion (*id.* at 207; *Leg. Hist.* 373) (same). From the opposite perspective, Senator Inouye objected to the bill because it did no go far enough in protecting employees from "the risks" of "large-scale employee cutbacks and other disruptions" (*id.* at 221; *Leg. Hist.* 387) (minority views of Sen. Inouye). The other two dissenting committee members were Senators Melcher and Goldwater. See *id.* at 222-224; *Leg. Hist.* 388-390 (minority views of Sen. Melcher) (expressing concern over "assuredly * * * wide spread unemployment and dislocation among the labor forces of the carriers"); *id.* at 225-228; *Leg. Hist.* 391-394 (minority views of Sen. Goldwater). Finally, one Senator who voted for the bill did so in part because the final bill, unlike the original version, included a "program to assist employees who might be dislocated" (*id.* at 216; *Leg. Hist.* 382) (additional views of Sen. Danforth).

from committee (see page 31 n.19, *supra*), proposed deleting the assistance program altogether, leaving only a duty to hire (124 Cong. Rec. 10674-10676 (1978); *Leg. Hist.* 443-446). Significantly, however, while Senator Zorinsky's proposal would have eliminated the assistance plan, it would, quite deliberately, have "liberal[ized]" the duty to hire, by expanding the definitions of "protected employee" and "qualifying dislocation" (*id.* at 10674-10675; *Leg. Hist.* 443-444). Senator Cannon, the floor manager of the bill, endorsed the duty-to-hire aspect of the amendment as a "good" "concept * * * [which] would insure that people have the opportunity to work, even though it is with another carrier" (*id.* at 10677; *Leg. Hist.* 448). After vigorous debate, in which one chief supporter of the Committee Bill opposed Senator Zorinsky's modification (see *id.* at 10677-10678; *Leg. Hist.* 448-450) (remarks of Sen. Danforth), the Senate rejected Senator Zorinsky's effort to scale down the EPP (*id.* at 10683; *Leg. Hist.* 458). It bears repeating that nowhere in this debate about whether to strengthen the duty to hire is there any mention of a role for regulations or the legislative veto.

The Senate lopsidedly rejected an amendment proposed by Senator Hatch that would have entirely eliminated the EPP (124 Cong. Rec. 10679, 10682 (1978); *Leg. Hist.* 451, 457).[20] After a strong defense of the EPP by two of its proponents (*id.* at 10682; *Leg. Hist.* 456-457) (remarks of Sens. Kennedy and Cannon), the Hatch amendment was de-

---

[20] Although the Hatch amendment would have eliminated even the duty-to-hire provision, here, too, the only objection to the EPP expressed by Senator Hatch was to the costliness of the financial assistance provision (*id.* at 10679, 10682; *Leg. Hist.* 451, 457).

feated 85-7. Following renewed expressions of support for the deregulation bill—including, in particular, support for the EPP (see *id.* at 10695; *Leg. Hist.* 479 (remarks of Sen. Muskie))—the Senate overwhelmingly passed S.2493, providing for airline deregulation (*id.* at 10698; *Leg. Hist.* 485-486). In all of the debate, no one—neither a supporter, nor an opponent of the bill—said one word about the legislative veto.

c. *The House Bill*

The history of the Deregulation Act in the House confirms the same conclusions: Congress was very concerned about employee protection, and was not concerned about a legislative veto. The employee protection sections of the House Bill differed substantially from the Senate Bill, which eventually became law. The House Bill provided that the "authority granted [to airlines] by the [deregulation] bill may not be exercised until the Secretary of Labor certifies that employees affected by new authority are protected by arrangements no less favorable than those in * * * [certain sections of] the Interstate Commerce Act and * * * the Rail Passenger Service Act." These arrangements included benefits to be paid by employers, but "reimbursed from a separate account in the U.S. Treasury" (H.R. Rep. 95-1211, 95th Cong., 2d Sess. 22 (1978); *Leg. Hist.* 530). The House Bill had no legislative veto or other oversight provision.

The House Bill would have delegated substantial authority to the Secretary of Labor, who had to "certify" that employees were "protected" by arrangements "no less favorable" than those under two other transportation statutes before any of the authority granted by the deregulation bill could be exercised.

Yet, as noted, it provided no legislative oversight of the Secretary's determinations. The willingness of the House Committee on Public Works and Transportation to pass favorably on a bill with these features demonstrates both strong House support for employee protection and, even more significantly, a willingness to delegate substantial decision-making authority to the Secretary without legislative oversight.[21]

d. *The House Debates*

Employee protection provoked no controversy at all when the House debated the Deregulation Act. Congressman Anderson, who managed the bill on the floor, stated that one feature of the legislation "insure[d] that the costs of the transition to a more competitive system will not weigh too heavily * * * on airline employees" (124 Cong. Rec. 29526 (1978); *Leg. Hist.* 731) (statement of Rep. Anderson). Congressman Anderson made clear the House's concern that "regulatory reform * * * not have an undue impact on airline employees" (*ibid.*; *Leg. Hist.* 732) (same). Otherwise, the provision emerged from the House debates without comment; and, despite its broad delegation of power to the Secretary, it was adopted without any mention of legislative oversight.[22]

---

[21] Congressman Levitas, the one Member of Congress who eventually commented on the legislative veto, supported the House Bill; and although he noted some disagreement with what he thought was the "precipitous[ness]" of the House Bill, he said nothing at this point about any need to insert a legislative veto (H.R. Rep. 95-1211, at 73; *Leg. Hist.* 581) (additional views of Rep. Levitas).

[22] Again, Congressman Levitas, as he had when the bill emerged from committee, spoke enthusiastically about the bill. Again, he did not mention the veto power (124 Cong.

The bill passed the House by a vote of 363 to 8 (124 Cong. Rec. 30708 (1978); *Leg. Hist.* 824-825).

e. *The Bill Reported By The Conference*

The final version of the EPP, as it emerged from conference, was "basically the same as the Senate bill" (H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. 105 (1978); *Leg. Hist.* 947) (listing the differences). The Conference Report gives no indication that there was any consideration in conference of eliminating the EPP; and, except in the text and summary of the bill itself, the report makes no mention of a legislative veto. Thereafter, when the two chambers considered the final bill, the legislators again stressed their support for the EPP. See 124 Cong. Rec. 37416 (1978); *Leg. Hist.* 968 (statement of Sen. Cannon) (characterizing the EPP as an "important protection[]" in the bill); *id.* at 37421; *Leg. Hist.* 975 (statement of Sen. Stevenson); *id.* at 38522; *Leg. Hist.* 981 (statement of Rep. Snyder); *id.* at 38523; *Leg. Hist.* 984 (statement of Rep. Johnson). Indeed, two members of the House expressed their regrets that the EPP had not been made even *stronger*. See *id.* at 38523; *Leg. Hist.* 983 (statement of Rep. Harsha); *id.* at 38524-38525; *Leg. Hist.* 986 (statement of Rep. Mineta). But Congressman Anderson, who had managed the Conference Bill on the floor (*id.* at 38521; *Leg. Hist.* 980), assured the other

---

Rec. 29529-29530, 30671 (1978); *Leg. Hist.* 737-738, 760) (statement of Rep. Levitas). Indeed, the Congressman expressed his view that the House Bill—which did not contain a veto clause—was "far superior to the bill of the other body in every respect" (*id.* at 30671; *Leg. Hist.* 760) (statement of Rep. Levitas). The Senate Bill, of course, did contain a legislative veto provision.

members of the House that the "conference provisions represent substantial progress for the airline employees" (*id.* at 38522; *Leg. Hist.* 981).

During this debate on the Conference Bill—indeed, during Congress' *entire* deliberation on the EPP—only *one* comment, by Congressman Levitas, was made about the legislative veto provision (*id.* at 38524; *Leg. Hist.* 985-986).[23] Plainly, however, even in Congressman Levitas' own consideration of the legislation, the veto provision played an insubstantial role. As noted above, he was a supporter of the House Bill, which would have delegated substantial authority to the Secretary and would have required that authority to be exercised before deregulation could even become operational, but he made no attempt to add a legislative veto provision, or any other oversight provision (see page 35 nn.21, 22, *supra*). The Congressman's remarks in the post-conference debate, as their tone reflects, are best understood as support for legislative vetoes in general—not as a belief that the veto had some special significance in the EPP.[24]

---

[23] Representative Levitas stated: "Finally, Mr. Speaker, I cannot let this moment go by without making this observation. While there have been several bills sent to the President this year and signed by him which contained a provision for a congressional veto, I am happy to say that this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on the regulations that will have the effect of law."

[24] Representative Levitas has been an ardent partisan of the legislative veto device and has supported its inclusion in a wide variety of statutes to cover all agency regulations. See, *e.g., Legislative Veto Proposals: Hearings on S. 890 and S. 684, Before the Subcomm. on Agency Administration of*

In sum, the legislative history amply supports the court of appeals' conclusion. Committees and leaders of Congress repeatedly expressed strong support for the EPP, insisting that displaced employees not bear an unfair portion of the costs of deregulation. By contrast, there is only one committee report reference to the legislative veto (and it relates the veto to the assistance program), and one Congressman on one occasion mentioned the legislative veto (and his comment was routine praise for a device he vigorously supported). On that record, there is simply no basis to conclude that Congress—had it known that the veto would one day be invalidated—would have

---

the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 97 (1981); *Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658, H.R. 8231, and Related Bills, Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 142 (1975). Indeed, Congressman Levitas' unusual devotion to the legislative veto was recognized by his colleagues in the House. In 1978, during the same period of time that the Deregulation Act was being considered in Congress, one Congressman paid tribute to Congressman Levitas' "leadership in the fight to establish a congressional veto over executive agency rules and regulations" (124 Cong. Rec. 19 7 (1978) (statement of Rep. Alexander)). Congressman Alexander described his colleague as "[u]ndaunted by an administration that opposes the concept of a legislative veto" and noted that Congressman Levitas had "time and again brought our attention to the need for such a veto through introduction of amendments to authorizing legislation for the various Federal agencies" (*ibid.*). Representative Levitas has continued his support of the legislative veto device, strongly expressing his view that this Court was mistaken in ruling as it did in *Chadha*. See, *e.g.*, 130 Cong. Rec. H2520 (daily ed. Apr. 10, 1984); *id.* at H10516 (daily ed. Oct. 1, 1984); Levitas & Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 Hofstra L. Rev. 593, 613 (1984).

wished this Court to invalidate the balance of the EPP as well.

Petitioners' picture of "uncertainty" and "doubts" in Congress that labor protection was even necessary (Br. 34-37), their suggestion of congressional "concern" that the Department of Labor might not be "knowledgeable or even sympathetic to the objectives of the Deregulation Act" (Br. 38), and their assertion that "Congress left open many fundamental issues for subsequent resolution through administrative action subject to congressional review" (Br. 37) are all belied or totally unsupported by the legislative history. What petitioners describe as "uncertainty" about the need for labor protection was, as the court of appeals noted (Pet. App. 21a-22a), simply "the sincerely held belief in various legislative quarters that loss of employment in a deregulated industry was unlikely," not opposition to insurance in case it occurred. No one in Congress, not even those most optimistic about the future of deregulation, denied at least the possibility of employee dislocation; and no one spoke in opposition to establishing a duty-to-hire provision as insurance. See, *e.g.*, S. Rep. 95-631, at 206-211; *Leg. Hist.* 372-377 (additional views of Sen. Zorinsky). Nor is there a whisper in the legislative record that Congress doubted either the ability or willingness of DOL to administer the program; certainly petitioners point to no evidence of this.[25] Finally, at least in the duty-to-hire provisions, Con-

---

[25] Indeed, contrary to petitioners' suggestion (Br. 38), the Department of Labor had had significant regulatory responsibilities for other employee protection programs. See, *e.g.*, Rail Passenger Service Act, 45 U.S.C. 565(b); Redwood National Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163 *et seq.*

gress did *not* leave open "many fundamental issues" (Pet. Br. 37) for regulatory resolution.

Petitioners' suggestion that the legislative veto was part of a compromise at conference is also without foundation. Petitioners note that in conference the Congress deleted a "qualifying dislocation" requirement applicable to the duty-to-hire provisions, with the effect, they say, of "provid[ing] less guidance to DOL regarding the duty-to-hire authority" (Br. 41). At the same time, petitioners contend, Congress strengthened the oversight requirements of the EPP —by adding the six-month rule and the report-and-wait provision—while simultaneously deleting a veto provision elsewhere in the bill (Br. 41-42). "By strengthening the Section 43 veto in conference, and at the same time removing a veto provision from a section that was at least as controversial as Section 43, Congress unmistakably demonstrated its serious reservations about the regulatory authority delegated to DOL" (Br. 44).

Petitioners' claims were correctly rejected by the court of appeals (Pet. App. 26a-28a). The removal of the "qualifying dislocation" requirement did potentially expand the class of protected employees (and thus is further evidence of congressional enthusiasm for the duty to hire), but it had no stated, or logical, relationship either to the Secretary's regulations or to the power to veto them. If Congress believed that by removing this requirement it was investing DOL with some new and less fettered authority, or if it perceived any tie between this step and the matter of legislative oversight, it never said so. The decision to remove the veto provision in a wholly unrelated part of the Act says nothing at all about the failure to delete a legislative veto in the EPP; again, Con-

gress gave no expression to the motivations petitioners ascribe to it. Finally, the addition in conference of the six-month deadline and the report-and-wait rule are, at best, equivocal evidence: the former suggests a desire to proceed promptly with implementation, while the latter, as the Court recognized in *Chadha* (see page 25 n.15, *supra*), reduced the importance of the veto provision; in any event, no one in Congress suggested that these steps were part of any compromise. Indeed, apart from the lone reference to the legislative veto by Congressman Levitas,[26] the *only* discussion of the EPP after conference, in either House, consisted of either wholesale approval (see, *e.g.*, *id.* at 38523; *Leg. Hist.* 983 (statement of Rep. (statement of Sen. Cannon); *id.* at 38522; *Leg. Hist.* 981 (statement of Rep. Snyder)), or regrets that the protections had not been made even stronger (see, *e.g.*, *id.* at 38523; *Leg. Hist.* 983 (statement of Rep. Harsha); *id.* at 38524-38525; *Leg. Hist.* 986 (statement of Rep. Mineta). In fact, the only real evidence

---

[26] Petitioners maintain that Congressman Levitas tried to "persuade" a "skeptical House" to "acquiesce" in the Senate's approach to the EPP, by "emphasizing the importance of the legislative veto" (Br. 43). As our previous discussion indicates, Congressman Levitas was not trying to "persuade" anyone, nor were his colleagues "skeptical" about the bill. The Congressman was simply extolling the presence of a legislative veto in this bill—a theme, we have noted, he returned to on numerous occasions in a variety of contexts. Moreover, as the court of appeals correctly observed (Pet. App. 27a-28a), those few members of the House who were, indeed, "skeptical" felt that the employee protections did not go far enough. As the court of appeals put it, "[i]t seems * * * unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy" (Pet. App. 28a).

of what *Congress* thought had been done to the EPP in conference was expressed by the House floor manager, Congressman Anderson; he assured his colleagues that the Conference Bill on employee protections had been made "considerably stronger than the Senate bill" (*id.* at 38522; *Leg. Hist.* 981).

Thus, the debate on the EPP ended in conference just as it had begun in the Senate: Congress maintained its support for a strong EPP, and paid virtually no attention—let alone "emphatic" attention (Br. 45)—to the presence of a legislative veto.[27]

CONCLUSION

Congress spoke plainly when it enacted the EPP. It sought deliberately to protect airline employees in order that "the benefits to the public which result from its decision to alter substantially the regulation of air transportation * * * not [be] paid for by a minority—the airline employees and their families

---

[27] Based on this legislative record, the case for severability is far stronger here than it was in *Chadha*. In *Chadha* the Court found in the history of related immigration legislation that "Congress was reluctant to delegate final authority over cancellation of deportations" (462 U.S. at 932), and thus that, at least to some extent, "Congress[] desire[d] to retain a veto in this area" (*id.* at 934). Similarly, in *Consumer Energy Council*, 673 F.2d 425, which this Court affirmed without opinion, 463 U.S. 1216, the court of appeals, while finding severable a legislative veto attached to a portion of the Natural Gas Policy Act of 1978, conceded that there were "contradictory comments about the importance of [the legislative veto]" (673 F.2d at 442), including statements on the floor that a key portion of the legislation "could be rejected by legislative veto" (*id.* at 442-443). By contrast, there is no evidence on this record that anyone in Congress was concerned about the power to veto regulations connected with the duty to hire.

who have relied on the present system" (S. Rep. 95-631, at 114; *Leg. Hist.* 280). The duty-to-hire provisions of Section 43—the only provisions ever to become operational—impose a direct obligation on air carriers, an obligation that was not made dependent on regulations or subject to veto. The EPP was overwhelmingly approved by both Houses of Congress; and not once in either House—not in committee, not on the floor, and not in conference—did anyone in Congress suggest, even obliquely, that legislative oversight of the EPP regulations was important. The veto was simply of no visible concern to anyone.

Given the only two choices that were available to the court of appeals once the legislative veto was invalidated, that court made the right selection. Petitioner's alternative approach—requiring courts to search the record for any evidence that Congress might have passed a different statute if it had known that there would be no veto provision—is truly a rule of judicial nullification. But statutes, as Judge (later Mr. Justice) Cardozo once said, "are not to be sacrificed by courts on the assumption that legislation is the play of whim and fancy * * * Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert" (*People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 62-63, 129 N.E. 202, 207-208 (1920). The court of appeals saved the balance of Section 43 and left to Congress the choice of how, if at all, to amend it, in light of the veto's demise. That was exactly what the law requires.

For all of the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

DOUGLAS LETTER
Attorney

JULY 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20273